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Supreme Court, U.S.
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No. 04-66

IN THE

Supreme Court of the United States

Abdela Tum *et al.*,

Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This case presents the question whether petitioners are entitled to full compensation for the time they spend each day complying with respondent's requirement that they wear special clothing and equipment to protect the quality of respondent's food products and avoid expensive workplace accidents. Respondent has argued that although it is required to pay for the time petitioners spend putting on and taking off the clothing and equipment, it is not required to pay for the time petitioners spend walking between and waiting at equipment stations or the time spent walking between the stations and the factory floor. There is nothing in the Portal Act that requires this incongruous result.

The briefing has narrowed the dispute in this case to two essential questions: (1) whether the donning and doffing of required safety gear is a "principal activity," within the meaning of Section 4 of the Portal Act, 29 U.S.C. 251 *et seq.*, and (2) whether, even if donning and doffing are not principal activities in themselves – but rather, as respondent claims, a compensable non-principal activity – the walking and waiting associated with donning and doffing are nonetheless compensable as a part of that compensable donning and doffing process. As described in petitioners' opening brief, donning and doffing *are* part of petitioners' principal activities at Barber Foods and, in any event, are part and parcel of an activity this Court has already held compensable under the Portal Act. Respondent's arguments to the contrary do not withstand scrutiny.

I. Petitioners' Walking And Waiting Time Is Compensable Because Donning And Doffing Required Safety Equipment Is Part Of Petitioners' Principal Activities.

Walking and waiting are ubiquitous during the workday. Office workers walk from cubicles to supply rooms, court reporters wait during breaks in a trial, factory workers walk between positions on a production line and sit in idleness

waiting for the production line to be repaired. See 29 C.F.R. 785.15. No one disputes that such walking and waiting time is compensable during the workday notwithstanding the Portal Act. See, *e.g.*, *Tum* Resp. Br. 36 & n.5. The walking and waiting time in this case is no different. It occurs during the workday, which begins and ends with the donning and doffing of petitioners' required safety gear, the first and last "principal activity or activities" of the day.

A. The Critical Dispute In This Case Is Whether Donning And Doffing Are Part Of Petitioners' Principal Activities

For all the pages of briefing, the actual dispute in this case is quite narrow. As just noted, the parties in this case and in *IBP* v. *Alvarez*, No. 03-1238, all agree that the Portal Act does not apply to activities that occur during the workday. See *Tum* Resp. Br. 8, 21; *Alvarez* Pet. Br. 11-12. The parties further agree that the workday is defined by the first and last principal activity of the day. See *Tum* Resp. Br. 15; *Alvarez* Pet. Br. 15-16.[1] This agreement is unsurprising – on its face Section 4 of the Act applies only to activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Section 4(a).[2]

The critical dispute, instead, is whether petitioners' "principal activity or activities" encompass donning and doffing or instead, as respondent argues, are exclusively limited to "processing chicken, not donning and doffing

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[1] No party in either case supports the view of the concurrence below that a principal activity commences the workday only if it requires more than a *de minimis* amount of time to complete. That argument lacks merit for the reasons described in petitioners' opening brief at 41-49.

[2] This conclusion is also amply supported by the legislative history and Department of Labor regulations. See Pet. Br. 15-17.

clothing and equipment." *Tum* Resp. Br. 7. If petitioners are right, there can be no dispute that they are entitled to compensation for the walking and waiting time at issue in this case. That is, if donning and doffing are part of petitioners' principal activities, then the work day begins and ends in the donning areas, starting with the commencement of the donning process and ending with the completion of doffing the required clothing and equipment at the end of the day. The walking and waiting occurs during the workday, thus defined, and accordingly falls outside the scope of Section 4.

On the other hand, if respondent is right about the scope of petitioners' "principal activities," the workday begins and ends on the production floor, starting when the chicken processing commences and ending when the production line stops. On that view, the travel between the donning/doffing areas and the production floor would seemingly be excluded from compensation under Section 4(a)(1) because it would constitute "walking * * * to and from the actual place of performance of [petitioners'] principal activity" outside of the workday. Likewise, the walking and waiting during the donning process would appear to constitute a "preliminary to or postliminary to said principal activity" within the meaning of Section 4(a)(2).[3]

In arguing that donning and doffing are not principal activities, the employers do not dispute that in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), this Court held that

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[3] Ironically, in order to square their interpretation of "principal activity" with *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the employers are compelled to take the position that even if activities fall outside the scope of the workday – and would therefore seemingly constitute non-compensable "preliminary" or "postliminary" activities – they may yet be compensable if they are "integral and indispensable" to the workers' principal activities. See *Tum* Resp. Br. 26; *Alvarez* Pet. Br. 17-18. As explained in Section II, *infra*, if this Court adopts that view, and holds that donning and doffing are not "principal activities," petitioners would still prevail.

indistinguishable donning and doffing was "an integral part of and indispensable to [workers'] principal activities" and, for that reason, fell outside the scope of the Portal Act's presumption against compensability. 350 U.S. at 255. The disagreement, instead, is over whether such "integral and indispensable" activities constitute part of the workers' "principal activities," as petitioners argue, or whether, as the employers assert, "integral and indispensable" activities constitute a distinct category of compensable work that falls outside the scope of the employees' "principal activities."

B. *Steiner* Held That Donning And Doffing Are Principal Activities

As petitioners explained in their opening brief (at 18-21), this Court already resolved that dispute in *Steiner*. The donning and doffing in that case was held compensable notwithstanding the Portal Act precisely because this Court concluded that these preparatory activities were within the scope of the employees' principal activities.

The employers in this case, however, offer a very different interpretation of *Steiner*. Whereas petitioners argue that the Court interpreted "principal activities" to *include* all activities that are an integral and indispensable part thereof, the employers argue that the Court created a new category nowhere mentioned in the statute: "integral and indispensable" activities that are neither "principal" nor "preliminary"/"postliminary," (or, perhaps, activities that *are* "preliminary"/"postliminary," but are nonetheless compensable). See *Tum* Resp. Br. 26; *Alvarez* Pet. Br. 17-18. Although this interpretation is impossible to square with the text of the statute, the employers insists that it *must* be the interpretation this Court embraced in *Steiner* because the alternative reading of the case would lead to an unacceptable construction of "principal activities." *Tum* Resp. Br. 25; *Alvarez* Pet. Br. 18-19. The employers are wrong on every point.

1. Language Of The Opinion

The opinion in *Steiner* makes the basis for the decision abundantly clear. At the beginning of the decision, the Court announced that the "precise question" before the Court was "whether workers in a battery plant must be paid *as a part of their 'principal' activities* for the time incident to" changing clothes at the plant or instead "whether these activities are 'preliminary' or 'postliminary' within the meaning of the Portal-to-Portal Act and, therefore, not to be included in measuring the work time for which compensation is required." 350 U.S. at 248 (emphasis added). There was no mention of a third possibility – that the clothes changing could be compensable *even if* it was undertaken preliminary or postliminary to the workers' actual principal activities, so long as it was "integral and indispensable." Certainly no party in the case took that position. The Government argued, and the lower courts accepted, that the clothes changing was compensable because "the term 'principal activity or activities' in Section 4 embraces all activities which are an 'integral and indispensable part of the principal activities,' and that the activities in question fall within this category." *Id.* at 252-53 (footnote omitted); see also *id.* at 249 (Government argued that clothes changing was compensable because it was "part of" the workers' principal activities); *id.* at 252 (district court held that clothes changing was integral and indispensable and was, "therefore, included among the principal activities of said employees"). The employer, on the other hand, insisted that "integral and indispensable" activities were noncompensable precisely because they "fall without the concept of 'principal activity.'" *Id.* at 251.

Because all parties agreed that the clothes changing was "integral and indispensable," the only question before this Court in *Steiner* was whether the Government was right that such activities are part of the workers' principal activities or whether the employer was right that they are not. That, of course, is precisely the same question posed in this case.

In *Steiner*, the Court's answer was unequivocal – the clothes changing was compensable because it was "an integral and indispensable *part of* the principal activities for which covered workmen are employed and [was] not specifically excluded by Section 4(a)(1)," 350 U.S. at 256 (emphasis added). In concluding that the integral and indispensable act of clothes changing was "part of" the workers' principal activities, the Court relied on a Department of Labor regulation that likewise provided that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," and legislative history that adopted the same definition. 29 C.F.R. 790.8 (cited at 350 U.S. at 255 n.9).

The employers insist that this cannot be the holding of *Steiner*, for it results in an interpretation of "principal activity" that is, in their view, far too broad. See *Tum* Resp. Br. 25; *Alvarez* Pet. Br. 18-19. The term "principal activity," they assert, is much narrower, encompassing only the employees' "most important" or "chief" duty undertaken on "the production floor" during "an employee's regular, scheduled shift * * * when he is required to be at his workstation ready to work." *Tum* Resp. Br. 15, 23. See also *Alvarez* Pet. Br. 15. This interpretation is so clearly right, the employers argue, that the Court could not possibly have rejected it. *Tum* Resp. Br. 25; *Alvarez* Pet. Br. 18-19.

But it did. The employer in *Steiner* advanced precisely the same interpretation of "principal activity," arguing that clothes changing fell outside "the concept of 'principal activity'" because it was "performed off the production line and before or after regular shift hours." 350 U.S. at 251-52. Had this Court accepted that interpretation of "principal activity" in *Steiner*, the employer would have won the case.

2. Opinion's Rationale

The employers insist that this is not true, that the employees won in *Steiner* by convincing the Court to hold that donning and doffing safety clothing was compensable

even though it was not a principal activity itself. See *Tum* Resp. Br. 24-25; *Alvarez* Pet. Br. 17-18. As shown above, that conclusion finds no support in the Court's opinion in *Steiner*. Moreover, the interpretation of the Portal Act the employers ascribe to *Steiner* is completely implausible, flying in the face of the plain language of the Act itself.

If, as the employers must argue, the only principal activity in *Steiner* was making car batteries, then the clothes changing in that case was clearly "preliminary" and "postliminary" within the meaning of the Portal Act, because it occurred before and after the work on the factory floor. There's nothing in the statute, or in common sense, to support the view that an activity that occurs before and after the workers' principal activities could be anything but "preliminary to or postliminary to said principal activity." Section 4(a)(2). Nor is there anything in the Act that supports the employers' hypothesized third category of activity that occurs prior to a worker's principal activities, but that is nonetheless not "preliminary" within the meaning of the Act, or that is "preliminary" but nonetheless compensable.

Respondent cannot explain how the Court could have nonetheless upheld the workers' claims in *Steiner*. IBP does little more, suggesting only that this Court relied on the legislative history to justify the invention of a new category of compensable activities having no connection to the text of the statute, reflecting the Court's "methodology [of statutory construction] of the time." *Alavarez* Pet. Br. 29. That suggestion is baseless. It was just as well established in 1954 as it is today that "[t]he plain words and meaning of a statute cannot be overcome by a legislative history." *Ex parte Collett*, 337 U.S. 55, 61 (1949). The Court in *Steiner* was true to that principle, looking first to the statutory text but finding it ambiguous, then turning to other traditional sources to resolve the ambiguity. This Court applies the same methodology today, as does IBP in its brief to this Court. Compare 350 U.S. at 254 ("The language of Section 4 is not free from ambiguity and the legislative history of the Portal-

to-Portal Act becomes of importance."), *id.* at 253 (reviewing congressional purposes), and *id.* at 254-55 (reviewing subsequent amendments and regulations) with *Alvarez* Pet. Br. 13-15 (text), *id.* 20-29 (legislative history and purposes), and *id.* 30-32 (regulations).

3. Unsuccessful Attempts To Distinguish Steiner

In addition to attempting to re-characterize the holding of *Steiner*, the employers also advance various supposed distinctions between that case and this one, none of which makes any difference.

First, the employers note that *Steiner* did not fully decide the question before the Court in this case. *Steiner* did not, for example, "address the issue of when the workday commences." *Tum* Resp. Br. 8. See also *Alvarez* Pet. Br. 17. That is true, but the parties themselves agree that the workday commences with the first principal activity. The critical dispute is over whether donning and doffing required equipment is such a principal activity, and *Steiner* does decide *that* question.

The employers also point out that *Steiner* did not involve a claim for compensation for walking, which is specifically addressed by Section 4(a)(1). See *Tum* Resp. Br. 8; *Alvarez* Pet. 19. That, too, is true but irrelevant. Petitioners do not rely on *Steiner* to fully establish their right to compensation for walking time. Instead, they rely on *Steiner* only to establish that donning and doffing are part of petitioners' principal activities; petitioners' right to compensation for walking time follows easily from there under the plain terms of the Portal Act. The Act exempts from compensation only walking to and from the place of the "actual place of performance of the principal activity" which "occur[s] either prior to the time on any particular workday at which said employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Section 4(a)(1). Thus, the provision's applicability turns again on the definition of "principal

activity." If donning and doffing are principal activities, then the walk to which Section 4(a)(1) refers is the walk between the factory gate and the equipment areas, not the walk between the equipment areas and the factory floor.[4]

The employers also note that in describing its holding, the Court in *Steiner* stated that activities are compensable if they "are an integral and indispensable part of the principal activities for which the workmen are employed *and are not specifically excluded by Section 4(a)(1)*." 350 U.S. at 256 (emphasis added). But this caveat has no application to petitioners' argument that their walking time is compensable because it occurs during the workday. That argument depends on *donning and doffing* being considered a principal activity, not on walking itself meeting the "integral and indispensable" test of *Steiner*. That is, under this argument the walking is compensable because it occurs during the workday (which starts with donning and ends with doffing), not because walking is itself an "integral and indispensable" part of petitioner's principal activities.

4. Congressional Acceptance Of Steiner*'s Holding*

As discussed below, *Steiner*'s interpretation of "principal activity" was manifestly correct. But even if respondent had made a persuasive case that *Steiner* misconstrued the Act, there would be no basis for applying a different definition of "principal activities" in this case. No party explicitly argues that *Steiner* was wrongly decided and none asks this Court to overrule it, for good reason. Almost fifty years have passed since the decision and *Steiner*'s construction of the Act has become settled law. Congress has had ample opportunity to narrow *Steiner*'s interpretation of "principal activity," but has not done so even though it has subsequently amended other

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[4] For that reason, petitioners seek compensation only for the time spent walking between various equipment stations, and between the donning/doffing areas and the factory floor, not for the walk between the factory gate and the equipment areas.

aspects of the Portal Act. See, *e.g.*, Pub. L. No. 93-259, § 6(d)(2)(A), 88 Stat. 61 (Apr. 8, 1974); Pub. L. No. 89-601, Title VI, § 601, 80 Stat. 844 (Sep. 23, 1966). "With respect to such a longstanding and well-known construction of [a] statute, and where Congress made substantive changes to the statute in other respects, we presume, absent any indication that Congress intended to alter [the interpretation], that Congress 'adopted that interpretation' when it reenacted [the] statute." *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700 (1992) (citations omitted).

C. The Statutory Language, Legislative History And Purposes, And The Interpretive Regulations All Support The Conclusion That Donning And Doffing Are Part Of Petitioners' Principal Activities.

This Court's interpretation of "principal activities" in *Steiner* was, in any event, correct. Respondent argues that the phrase "principal activity" was intended to encompass only an employee's "'chief' or 'most important'" activity, which in this case, respondent says, "is processing chickens." *Tum* Resp. Br. 15. Consequently, the employers argue, the workday is limited to "the employee's regular, scheduled shift, the period from 'whistle to whistle,' when he is required to be at his workstation ready to work." *Id.* 22. See also *Alvarez* Pet. Br. 11 (Portal Act excludes "pre- and post-shift" activities such as "walking to and from the work stations"). That interpretation is wrong.

1. Statutory Language

The term "principal activity or activities" is intentionally broad and generic, ensuring that employees receive compensation for bona fide work benefiting their employers in the myriad work environments to which the statute applies. By using the plural "activities," Congress made clear that the phrase is not limited to a single "most important" activity, as respondent asserts (*Tum* Resp. Br. 15). There can be little

doubt that donning and doffing required safety equipment is among the most important duties petitioners perform as part of their employment. The equipment is worn primarily for the benefit of the employers, to ensure the cleanliness and quality of their food products and to prevent serious workplace injuries that could disrupt operations and impose substantial costs on the companies. If petitioners did not take the time to don and doff it, Barber Foods and IBP simply could not operate.

2. Legislative History And Purpose

The legislative history is also incompatible with the employers' insistence that "integral and indispensable" activities are not part of an employee's "principal activities," and that the statutory term excludes pre- and post-shift preparatory activities like donning and doffing.

As noted in *Steiner*, the Senate Report expressly provided that "[t]he term 'principal activity or activities' *includes* all activities which are an integral part thereof." S. Rep. No. 80-48, at 48 (1947) (emphasis added). To illustrate the definition of "principal activity," the Senate Report gives two examples: a lathe operator preparing his tools before the start of his shift and a garment worker distributing materials before production begins for the day. *Ibid.* During the Senate debates, Senator Cooper, a sponsor of the Act, repeated the definition from the Senate Report and applied it to two other examples: a worker required to arrive at work a half-hour before his shift to sharpen tools, 93 Cong. Rec. 2350 (1947), and workers required to don protective clothing before commencing their productive activities in a chemical plant, *id.* at 2297-98. In each of these examples, the employee was engaged in pre-shift preparatory activities that could not be considered part of the worker's principal activities under the definition advanced by the employers in this case. Yet, in every instance, the legislative history indicates that the pre-shift activity was compensable precisely because it is a part of the employee's principal activity or activities. See S. Rep. No. 80-48, at 48

(1947) (garment worker's pre-shift activities "are among the principal activities of such employee"); 93 Cong. Rec. 2350 (1947) (Sen. Cooper) (pre-shift tool sharpening compensable "as part of the principal activity"); *id.* at 2298 (Sen. Cooper) ("In accordance with our intention as to the *definition of 'principal activity,'* if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable *as part of his principal activity.*" (emphasis added)).

There is no doubt that the Act was intended to revise the compensation rule created by *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). But this legislative history demonstrates that the employers are wrong in claiming that "Congress intended *all* pre- and post-shift walking to be uncompensated except pursuant to contract, custom or practice." *Alvarez* Pet Br. 21. If Congress had intended to accomplish that goal, it would have defined the workday in terms of the employees' shifts, rather than in terms of "principal activities," a general phrase that has no inherent reference to time or place. Indeed, there was good reason for Congress to decline to define "principal activities" by reference to the beginning and ending of the employee's shift or to limit it to activities taking place at the worker's "workstation" or any other particular location. Defining the workday in accordance with the employer-established shift or workplace would predictably lead to strategic manipulation by employers seeking to expand the scope of Portal Act's exemption from compensation. Indeed, a prior version of the bill created precisely this risk by limiting the scope of Section 4 to activities that took place outside the "scheduled workday," defined in the Senate Report as the period of the day made "compensable by contract." S. Rep. No. 80-37, at 44 (1947); see also *id.* at 47-48. The bill was amended, however, to excise any reference to the employer's schedule or the employment contract, using instead the generic legal phrase "principal activity or activities." S. Rep. No. 80-48, at 47 (1947). And, as discussed above, Congress clearly

understood that phrase to encompass pre- and post-shift preparatory activities like donning and doffing.

3. Regulations

Like this Court's decision in *Steiner* and the Senate Report, the Department of Labor regulations also define "principal activity" to "include[] all activities which are an integral part of a principal activity." 29 C.F.R. 790.8(b). Moreover, while the employers argue that principal activities may only occur during the workers' shift, the regulations conclude that "Congress intended the words 'principal activities' to be construed liberally • • • to include any work of consequence performed for an employer, *no matter when the work is performed*." *Id.* § 790.8(a) (emphasis added). The regulations repeat the examples of pre-shift activities defined as "principal" in the legislative history, and conclude that "[s]uch preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract." *Id.* § 790.8(b).

No party challenges the correctness or validity of any of the Portal Act regulations and, indeed, the employers themselves rely on them. See *Tum* Resp. Br. 16-18; *Alvarez* Pet. Br. 30-32. The employers recognize, of course, that the Department of Labor has construed those regulations as supporting the workers' claims in this case. They nonetheless make the implausible claim that the Department of Labor has fundamentally misconstrued its own regulations.

To make that claim, the employers are forced to ignore the regulation that defines "principal activity" and the bulk of the regulations which, as petitioners' established in their opening brief (at 21-24), support the Department of Labor's position in this case. The employers ignore, for example, the regulation that provides that travel is compensable as part of a day's work when it is preceded by activities such as "report[ing] to a meeting place to receive instructions • • • or to pick up tools." 29 C.F.R. 785.38. Under the employers'

theory, receiving instructions or picking up tools would, at most, be "integral and indispensable" activities that could not start the workday and the subsequent travel would, therefore, fall outside the workday and be rendered noncompensable by the Portal Act. Yet the regulations require compensation for the travel because it occurs "during the workday." *Ibid.*

Instead, the employers rely principally on a single ambiguous and inconclusive footnote, asserting that it establishes a principle that is directly contradicted by the body of the regulations and the plain text of the Portal Act. See *Tum* Resp. Br. 17-18 (citing 29 C.F.R. 790.7(g) n.49); *Alvarez* Pet. Br. 30-31 (same). As petitioners explained in their opening brief (Pet. Br. 34-35 n.19), the intended meaning of footnote 49 is far from clear. On its face, the footnote reaches no conclusion about the compensability of time spent traveling between a clothes-changing location and the place of the performance of a principal activity. But the question left open by the footnote has since been answered by the Department of Labor through its enforcement actions in other cases and its briefs to this Court in this case. See *Alvarez* DOL Br. 23-25. As demonstrated above, that answer is amply supported by the body of the regulations and by the text of the Portal Act. Like the employers' interpretation of *Steiner*, their reading of footnote 49 results in an interpretation of the Portal Act that is simply incompatible with the plain text of the statute. There is no way to read Section 4(a) to require compensation for donning and doffing unless that activity is deemed part of the employees' principal activities. And if that is true, then the walking and waiting at issue in this case, and the walking hypothesized in footnote 49, must occur during the workday and outside the scope of the Portal Act.

D. Incongruous Consequences Arise From Respondent's, Not Petitioners', Interpretation Of The Portal Act.

The employers' interpretation of the Portal Act leads to a series of incongruous results, discussed in petitioners' opening brief. Pet Br. 22-26. The responses of Barber Foods to these arguments, and its attempt to show that petitioners' interpretation would lead to absurd results, are unpersuasive.

1. As described in petitioners' opening brief (Pet. Br. 22-24), Congress intended the Portal Act to preserve the "continuous workday rule," a long-standing principle of compensation under the FLSA that generally requires employers to pay employees for all the time they spend on duty at their place of employment. Respondent does not deny that its construction of the Portal Act results in employees' right to compensation starting and stopping repeatedly as workers proceed from one equipment station to the next and between the equipment stations and the production line. Instead, respondent denies that the discontinuity is inconsistent with the continuous workday principle, pointing to the previously discussed footnote 49, a Department of Labor opinion letter that pre-dates the Portal Act, and a series of lower court cases involving police dog handlers. *Tum* Resp. Br. 24-32.

Petitioners have already discussed footnote 49. The conflict between respondent's reading of the footnote and the continuous workday rule is yet another reason not to adopt respondent's interpretation. The 1941 letter requires little comment, since because it was written long before the Portal Act and, if read as respondent would have it, contradicts the Department's interpretation embodied in its extensive post-Portal Act regulations and the text of the Act itself.

The canine unit examples are also unavailing. In those cases, canine officers sought compensation for commuting time on the ground that it occurred during their workday. That workday, the officers argued, began when they fed the

dogs at home prior to driving to work. Respondent argues that accepting petitioners' view of the Portal Act and the continuous workday rule would compel the Court to hold that these officers are entitled to pay for ordinary commuting time, and that the solution is to conclude that the workday does not commence with an "integral and indispensable but not principal" activity such as feeding a dog. That argument fails for two reasons.

First, respondent's reading of the Act does not solve the problem it identifies. There are undoubtedly many occasions on which an employee is required, prior to her commute to work, to perform an activity that even respondent would concede is a "true" principal activity. For example, a police officer scheduled for an afternoon shift may be required to appear in court for an hour in the morning, after which she will return home and then drive to work several hours later to begin her shift. Respondent's theory that only a true principal activity can start the workday would not solve the commuting time problem in this scenario if the officer claimed a right to compensation for her commute to work later that day, since the pre-commute event was clearly a true principal activity.

The commuting question is resolved by a proper application of the continuous workday principle, not through a contortion of the Portal Act. While it is true that the Portal Act does not apply to activities that occur between the first and last principal activities of the day, this does not mean that all time during this period is compensable. The continuous workday regulation itself creates important exceptions. That regulation provides that the "workweek ordinarily includes 'all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.'" 29 C.F.R. 785.7 (citation omitted). Thus, the rule does not apply when an employee is off-duty or to periods during which "an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." *Id.* § 785.16(a). Consequently, ordinary commuting does not fall within the

continuous workday rule because the off-duty employee is not "on the employer's premises, on duty or at a prescribed work place." *Id.* § 785.7. See also *id.* § 785.35 ("Normal travel from home to work is not worktime.").

By contrast, no exception to the continuous workday rule justifies the erratic starting and stopping of the time clock proposed by respondent in this case. While there are undoubtedly unconventional work arrangements for which application of the continuous workday rule may be difficult,[5] petitioners' is not among them. Petitioners seek compensation for time that is part of an ordinary contiguous workday, time during which they are "required to be on the employer's premises, on duty or at a prescribed work place.'" 29 C.F.R. 785.7. The Portal Act was not intended to interrupt compensation during such ordinary workdays.

2. Respondent also argues that petitioners' interpretation of the Act would lead to a series of absurd results, most of which have already been thoroughly discussed in the prior briefs. See, *e.g.*, Pet. Br. 32-34; *Alvarez* DOL Br. 26-30. One, however, warrants an additional response.

Respondent argues (*Tum* Resp. Br. 40-42) that any ruling in petitioners' favor would be of no consequence, because respondent could rearrange its donning and doffing process to avoid petitioners' claims for compensation. This would be accomplished, respondent says, through eliminating the wait at the equipment cages by dispensing "a couple of weeks supply" of the disposable equipment at a time, and by distributing the rest of the equipment on the factory floor. *Id.* 41. This argument actually serves to illustrate two of the points petitioners made in their opening brief.

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[5] The regulation itself provides that basic continuous workday rule applies "ordinarily," leaving open the possibility for a different rule in unusual circumstances. The Department of Labor has attempted to deal with some common forms of atypical work arrangements through specific regulations. See, *e.g.*, 29 C.F.R. pt. 785.

First, respondent concedes that there is no practical impediment to implementing petitioners' interpretation of the Portal Act by placing time clocks at the entrance to the donning and doffing areas. *Tum* Resp. Br. 40 ("True, if necessary, Barber Foods could do that."). Second, respondents' argument merely illustrates that respondent could make its equipment distribution process more efficient – by, for example, eliminating the wait at the equipment cages by distributing a week's worth of supplies at a time – but has chosen not to do so because it bears none of the costs of the inefficiencies.

Respondent asserts (*Tum* Resp. Br. 40) that any gain in efficiency would be offset by respondent's right to insist that workers arrive for work even earlier and wait in long lines to clock in. One would hope that employers would not intentionally arrange their clocking-in process to inflict undue wait time on their employees, and respondent's right to do so is limited. See 29 C.F.R. 790.7(g) (waiting to clock in is preliminary only "when performed under the conditions normally present"). Accordingly, one would expect that the general consequence of ruling in petitioners' favor would be an increase in the efficiency of donning and doffing processes generally, to the greater social good. However, even if this did not occur, it would not change the text of the Portal Act, this Court's holding in *Steiner*, or the regulations.

II. The Walking And Waiting Time In This Case Is Part Of The Donning And Doffing Process This Court Held Compensable In *Steiner*.

Even if this Court accepted the employers' interpretation of *Steiner* and held that donning and doffing are *non*-principal compensable activities, petitioners would still prevail. Surely *Steiner* contemplated compensation for the entire donning and doffing process in that case – including waiting to receive new clothes, walking from the clothing distribution points to the locker room and from the lockers to the showers and back – not just for the moments in which the workers were putting

on and taking off the clothing. The walking and waiting during the process is no less integral and indispensable to the employee's principal activities than are the clothes changing moments themselves. To hold otherwise would create a completely unadministrable rule of compensation, one an employer could implement only with a stopwatch.

Respondent does not contest that the walking and waiting time during the donning and doffing process is "necessary, is controlled by and directly benefits the employer, and is closely related to the donning activities." *Tum* Resp. Br. 37-38. That is precisely the definition of an "integral and indispensable" activity employed in *Steiner*. See 350 U.S. at 252. Respondent nonetheless argues that the walking time is not truly integral to the donning and doffing process because, given the layout of the particular plant in this case, the workers would have to traverse the same route even if they were not donning and doffing clothes and equipment along the way. *Tum* Resp. Br. 33. This is not precisely accurate – respondent admits that some additional walking is required during the donning process, for example to retrieve items from the locker room, *id.* 3, 39 – and surely is not true generally. Moreover, the rule suggested by respondent's point would be completely unadministrable, requiring employers to pay workers for the actual moments spent donning and doffing (some of which may occur while the employee is walking down the hall), but not for the time spent walking between the stations, unless the employee's path deviates from the one she would have taken if she had not been required to pick up the required gear.[6]

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[6] Respondent also argues that the walking is excluded by Section 4(a)(1) because it constitutes travel to the place of performance of petitioners' principal activities (in respondent's view, the production floor). But even under respondent's interpretation, walking between equipment stations is not walking to the factory floor and would, therefore, fall outside the scope of Section 4(a)(1).

With respect to the time spent waiting for equipment, respondent argues that "a reasonable amount of waiting time was intended to be noncompensable preliminary activity." *Tum* Resp. Br. 35. But, as petitioners noted in their opening brief (Pet. Br. 39-40), the regulations specifically state that a worker is entitled to compensation for time spent waiting for a compensable activity to begin, 29 C.F.R. 790.7(h), and during delays that occur in the midst of a compensable activity, *id.* § 785.15. Unlike time spent waiting to clock in, time spent waiting for required safety equipment occurs during the midst of a compensable process and is an inextricable part of that activity.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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